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No. 425

In the

Supreme Court of the United States

OCTOBER TERM, 1957

CITY OF DALLAS, TEXAS,
Petitioner,

v.

TUBBS MANUFACTURING COMPANY, INC., and UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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To the United States Court of Appeals for the Fifth Circuit

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, City of Dallas, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 29, 1957 (Petition for Rehearing in the said cause having been denied on August 5, 1957).

I.

REPORT OF THE OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 109), printed in Appendix A hereto, infra, pages 15-22, not yet reported.

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 29, 1957 (R. 117), printed in Appendix B, infra, pages 23-24; rehearing was denied on August 5, 1957 (R. 113), Appendix C, infra, page 25; the jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

III.

QUESTIONS PRESENTED

1. Whether a Court of Appeals may, in arriving at a decision in a case under its appellate jurisdiction apply substantive law which is in direct conflict with the decisions of the State Court construing a state statute or a city Charter which has the force and effect of a state statute.

2. Whether a Court of Appeals, after having on three previous occasions construed the identical law construed by the Texas courts, in two of which cases the U. S. Supreme Court had heretofore denied writs of certiorari and now when the question is presented to the Court of Appeals for

the fourth time, may reach a different conclusion from its previous determination, and different from that adopted by the Texas courts.

3. Whether a Court of Appeals may, in arriving at a decision under its appellate jurisdiction in construing similar statutes in one state, reach a different conclusion from that arrived at in another state.

4. Whether a Court of Appeals may, in arriving at a decision construing a state statute or a Charter provision of a city, having the effect of a state statute, disregard a construction placed upon such statute by the state court and adopt its own, contrary to Rules of Decisions Act, 28 U. S. C., Section 1652.

IV.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Constitutional provision involved in this case is *Article 11, Section 5, of the Texas Constitution*, reading as follows:

> "Sec. 5. Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State; said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half

per cent, of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent. thereon; and provided further, that no city charter shall be altered, amended or repealed oftener than every two years. As amended Aug. 3, 1909, proclamation Sept. 24, 1909; Nov. 5, 1912, proclamation Dec. 30, 1912."

2. The Charter provision of the City of Dallas, Section 194, which has the force and effect of an act of the legislature, reads as follows:

"Sec. 194. A lien is hereby created on all property, personal and real, in favor of the City of Dallas, for all taxes, ad valorem, occupation or otherwise. Said lien shall exist from January 1st in each year until the taxes are paid. Such lien shall be prior to all other claims, and no gift, sale, assignment or transfer of any kind, or judicial writ of any kind, can ever defeat such lien, but the Assessor and Collector of Taxes can pursue such property, and whenever found out, may seize and sell enough thereof to satisfy such taxes.

"All persons or corporations owning or holding personal property or real estate in the City of Dallas on the first day of January of each year shall be liable for all municipal taxes levied thereon for such year.

"The personal property of all persons owing any taxes to the City of Dallas is hereby made liable for all of said taxes, whether the same be due upon personal or real property, or upon both."

3. The statutory provision involved in this case is the *Rules of Decision Act, 28 U. S. C., Section 1652*, which reads as follows:

"The laws of the several states, except where the Constitution or treaties of the United States or acts

of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

V.

STATEMENT

Exchange Bank & Trust Company filed suit in the 134th Judicial District Court of Dallas County, Texas, against Tubbs Manufacturing Company, Inc., seeking to recover judgment for the sum of $1,580.23, together with a foreclosure of a chattel mortgage and a prayer for the appointment of a receiver to take charge of the personal property subject to the mortgage (R. 1-15). A receiver was appointed by the state court (R. 16-24).

Briggs-Weaver Machinery Company intervened in this suit, and by petition prayed for a judgment for $3,565.15, together with a foreclosure of its chattel mortgage on certain property of the Defendant, and prayed for the enlargement of the powers of the receiver to seize all of the property of the Defendant, and further made the United States a party to the suit (R. 24-34).

The United States filed a petition for removal to the U. S. District Court (R. 38-41). By way of intervention, the United States of America prayed for a judgment against the Defendant, Tubbs Manufacturing Company, Inc., for $8,815.70 with interest, for internal revenue taxes and claimed a lien (R. 41-46).

First National Bank in Dallas filed its petition of intervention and prayed for judgment in the amount of $963.62, together with the foreclosure of its lien on a Ford truck owned by the Tubbs Manufacturing Company, Inc. (R. 47-51).

The City of Dallas intervened and prayed for a judgment to recover ad valorem taxes for the years 1955 and 1956 together with the foreclosure of its tax liens, said taxes amounting to $62.63 for the year 1955, and $72.56 for the year 1956, and prayed that it be paid out of the proceeds of the sale of the personal property seized and sold by the receiver under the orders of the court (R. 54-59).

Tubbs Manufacturing Company, Inc., Defendant, admitted insolvency (R. 52).

The state-appointed receiver was confirmed by the United States District Judge and was given authority to take charge of all the personal property of the insolvent debtor and to sell the same to the highest bidder at a public sale on a designated date (R. 52-54).

The receiver sold the property in three lots and after the payment of expenses, there was deposited into the registry of the Court $5,118.94 (R. 69). The receiver divided the personal property into five separate lots; however, Lots 1, 2 and 5 included the property subject to the mortgage of the Exchange Bank & Trust Company, *and the remaining property not subject to any mortgage.* Lot 3 covered the Ford pickup truck mortgaged to the First National Bank.

Lot 4 included the property subject to the mortgage of the Briggs-Weaver Machinery Company (R. 69).

All the parties entered into a stipulation and agreed that the cause may be tried on stipulated facts (R. 68-86). The various parties claimed that their liens were effective on the days and dates as follows:

(a) The liens of the City of Dallas attached as of January 1, 1955, and January 1, 1956, respectively;

(b) The lien of the Government was supported by an assessment on August 15, 1956, and was filed of record on October 15, 1956;

(c) The lien of the Exchange Bank & Trust Company bears date of November 19, 1953, and was recorded November 25, 1953;

(d) The lien of the Briggs Weaver Machinery Company bears date of April 28, 1955, and was recorded May 3, 1955; and,

(e) The lien of the First National Bank in Dallas bears date of November 2, 1955, and was registered with the Texas Highway Department on November 17, 1955.

The trial court in its opinion (R. 87-89), disregarded all the liens and held that the U. S. Government is entitled to have its claim satisfied under Section 3466, which is known as the priority statute.

Judgment was entered accordingly for the U. S. Government, from which the Petitioner and the other parties appealed (R. 89-92).

The Court of Appeals reversed the trial court and held that the Exchange Bank & Trust Company, Briggs-Weaver

Machinery Company, and First National Bank in Dallas have liens which anti-date the lien of the United States, and, therefore, are entitled to be paid ahead of the Government. The Court further held that out of the part of the proceeds from the sale of the individual parcels of mortgaged property, the three above named private claimants had to pay the taxes to the City of Dallas specifically assessed against the respective property covered by their respective mortgages. *The court, however, did not provide for the payment of the balance of the taxes to the City of Dallas because the taxes of the City of Dallas also covered non-mortgaged property, all of which, together with the mortgaged property, were seized and authorized by the court to be sold, and were sold by the receiver as such.*

VI.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is not in accord with three previous decisions of the Court of Appeals, in which it construed the identical provision (Section 194) (R. 79) of the Charter of the City of Dallas, which has the force and effect of an act of the legislature.

Section 194 of the Charter of the City of Dallas (which has the force and effect of a legislative grant by virtue of Article 11, Section 5 of the Texas Constitution, and as held by the Texas Supreme Court in *City of Dallas v. Western Electric Company, 83 Tex. 243*), was first construed by the Court of Appeals for the Fifth Circuit in the bankruptcy case of *In Re Brannon, 62 Fed. 2d 959*, in 1933. There, the

City asserted that under Section 194 of the Charter, it had a prior, superior, general, perfected, true and specific lien good as against private claimants, either secured or unsecured. The Court held that the tax lien of the City of Dallas for the years 1929, 1930 and 1931, on merchandise consisting of changing stock of goods, was a valid lien attached to all the personal property coming into the hands of the trustee good in bankruptcy, and used the following language:

> "We think a true general lien for all city taxes is given the City of Dallas by the language last quoted, which adheres to the property notwithstanding its transfer and which, requiring no record, is good as a lien in bankruptcy. All property of the taxpayer falls under it, so that it is unnecessary to identify that assessed for the particular tax.
>
> * * * * *
>
> "We therefore think that the taxes due the City of Dallas have a first and general lien and must be first satisfied."

Petition for certiorari was denied *289 U. S. 72.*

In 1948, the same Charter provision was again construed by the Court of Appeals for the Fifth Circuit, in the case of *City of Dallas v. Crippen, 171 Fed. 2d 526 (writ of certiorari denied 336 U. S. 737).* In that case bankruptcy intervened during the month of February and the taxes were assessed in May. The suit was a contest between the City of Dallas and the U. S. Government, as to whether the lien of the City of Dallas for the personal property taxes of the bankrupt came ahead of an unsecured tax claim of the U. S. Government. The Court re-examined the

pertinent Texas decisions in an exhaustive opinion, and reaffirmed the decision in the *Brannon* case, supra. The Court used the following language:

> "Our conclusion is that Section 194 of the Dallas Charter fixes a lien on personal property actually within the City on the specific date; and that the City has such a lien for its taxes, which was preserved in bankruptcy, but that the payment of the claim therefor is required to be postponed until payment of the debts specified in clauses (1) and (2) of subdivision a of Section 104 of Title XI of the United States Code Annotated. See Section 107, subs. b and c of said Title. In determining the order of distribution between the City of Dallas and the United States, a careful distinction must be made between tax liens and tax priorities. It is well settled that claims for taxes secured by valid lien, like other valid liens, must be satisfied out of the bankrupt's estate before any distribution at all begins under Section 64, subject, however, to an express statutory exception inserted by the 1938 Act in Section 67, sub. c which provides for postponement in payment of tax liens in certain circumstances."

The Court of Appeals for the Fifth Circuit, for the third time, considered Section 194 of the Charter of the City of Dallas, in 1954, in the case of *Brans v. City of Dallas, 217 Fed. 2d 640*. The referee had ruled that the tax claim of the City was filed too late. The District Court reversed an order of the referee and directed the receiver to pay taxes on personal property due by bankrupt. In that opinion, Chief Judge Hutcheson, in affirming the judgment of the trial court, used the following language.

> "Under settled law,[1] the City had a tax lien on the properties from the sale of which the funds in the trustee's hands were derived and to the extent necessary to discharge the debt secured by the lien, the

proceeds of the sale of the property were withdrawn from or taken out of the assets of the estate.

"[1]*In Re Brannon, 5 Cir., 62 Fed. 2d 959; City of Dallas v. Crippen, 5 Cir., 171 Fed. 2d 526.*"

2. The decision of the Court of Appeals is not in accord with the applicable decisions of the Texas courts construing the same section of the Charter of the City of Dallas.

Prior to the decision by the Fifth Circuit Court in the *Brannon* case, the Texas Court of Civil Appeals, in *Texas Employers' Insurance Ass'n v. City of Dallas, 5 S. W. 614* (writ of error refused by the Supreme Court, thereby approving the holding: *Heinatz v. Allen, 217 S. W. 2d 944)*, held in a tax suit against the insurance company that the funds of the insurance company were taxable at its home office, and were subject to the lien of the City of Dallas given it by its Charter to secure their collection. The Court used the following language:

> "We can see no reason why it should not be subjected to the tax lien given the plaintiff by law."

The same Charter provision was again considered by the Texas Court of Civil Appeals in the case of *Urbish v. City of Dallas, 260 S. W. 2d 148, in 1953 (writ dismissed by the Supreme Court of Texas)*. In that case, the Court reaffirmed the recognition of the lien given to the City of Dallas for taxes on personal property recognized in *Texas Employers' Insurance Ass'n v. City of Dallas*, and also on the basis of the decisions in *In Re Brannon*, and *City of Dallas v. Crippen*, supra:

3. The decision in this case is not in accord with the Court's previous decision arising under similar statutes in another state.

In the case of *United States v. Atlantic Municipal Corporation, 212 Fed. 2d 709*, denied May, 1954 by the same Circuit Court of Appeals, the Court had before it a question of deciding the issue between the State of Florida, one of its counties, and the city, all claiming liens which were created by Florida statutes and arose January 1, 1949, against property of an insolvent debtor and the claim of the United States Government for income and excess profit taxes, which became a lien on May 1, 1949. The Court held that the claim of the Government seeking priority under Section 3466, 31 U. S. C. A., Section 191, must be rejected, and applied the rule of "first in time is the first in right," and based its decision on the case of *United States v. City of New Britain, 347 U. S. 85.*

It is thus seen that one rule is applied in Florida, and another one in Texas.

4. The decision of the Court of Appeals fails to give recognition to the decisions of the Texas courts that as between private lienholders and the State and a city, the liens of the State and the city supersede the private liens.

In *Kirk v. City of Gorman, 283 S. W. 188*, the Texas court held that it is competent for the legislature to provide priority for a lien supporting taxes over those of private liens, regardless of whether the private lien anti-dates the

liens of the city or the state. The same conclusion was reached by the Texas court in the case of *State v. Bank of Mineral Wells, 251 S. W. 1107.*

5. The decision of the Court of Appeals fails to recognize and give force and effect to the decisions of the Texas courts in the construction of the statute or Charter provision involved.

The holding in this case by the Court of Appeals is in conflict with the decision in the case of *Erie Railroad Company v. Tompkins, 304 U. S. 64*, and with the *Rules of Decision Act, U. S. C., Section 1652.*

6. The decision of the Court of Appeals in the application of the rule of circuity announced in the case of SAMMS v. CHICAGO TITLE & TRUST COMPANY, 111 N. E. 2d 172, under the facts in this case, is erroneous.

There is no question of mere priorities in this case with which Section 3466 deals, but purely a question of liens, the dates of which have been established without dispute. The Bankruptcy Act, as construed by the courts, clearly recognizes the tax lien of Petitioner and its status as between private claimants and the United States Government. There is no difference between the application of the provisions of the Bankruptcy statute to liens and claims from those of the Insolvency Statute, with which Section 3466 deals. The *New Britain* case, we believe, by adopting the rule announced in *Rankin v. Scott, 12 Wheat 177, 6*

L. Ed. 592, settled the issue. The application of the rule announced in the *New Britain* case should, under the facts, govern this case.

7. The decision of the Court of Appeals, if allowed to stand, will lead to confusion and will impede the orderly collection of taxes necessary for the sustenance of the State and its political subdivisions.

To say that it is necessary for a city to identify and value separately each item of personal property of a business institution and trace them and identify them in the hands of a receiver places an undue, if not impossible, burden upon state and local governments to meet.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16565

EXCHANGE BANK & TRUST COMPANY and BRIGGS WEAVER MACHINERY CO., FIRST NATIONAL BANK IN DALLAS and CITY OF DALLAS, TEXAS, Intervenors,

Appellants,

versus

TUBBS MANUFACTURING COMPANY, INC., and UNITED STATES OF AMERICA,

Appellees.

Appeal from the United States District Court for the Northern District of Texas.

(June 29, 1957.)

Before HUTCHESON, Chief Judge, and TUTTLE and CAMERON, Circuit Judges.

HUTCHESON, Chief Judge: Submitted on stipulated facts,[1] this case presented below, it presents here a single question. This is whether under the priority statute, Rev. Stat. 3466, 31 U. S. C. A. 191, the United States, the appellee, was entitled to have its debt for taxes first satisfied out of the proceeds of the sale of all of the assets of Tubbs Manufacturing Co., an insolvent taxpayer corporation, ahead of the tax lien claims of the Exchange Bank & Trust Co., the First National Bank, and the Briggs Weaver Machinery Co., the appellants herein.

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[1] In a suit filed by the Exchange Bank & Trust Co. in the State District Court on Oct. 26, 1956 (later removed to the United States District Court), to recover judgment for the unpaid balance of its debt, to foreclose its chattel mortgage lien and to have the machinery and equipment covered by the mortgage sold and the proceeds applied in payment thereof, the court appointed receiver of the insolvent Tubbs Mfg. Co. sold all of its assets free and clear of all liens for the total sum of $6349.00. After deducting the expenses of the receivership proceedings, the balance of $5118.94 was deposited in the registry of the court to await determination of the rights of the respective claimants thereto.

The Exchange Bank & Trust Co. had chattel mortgages dated November 19, 1953, recorded Nov. 25, 1953, and June 30, 1954, recorded July 14, 1954, securing those claims in the net amount of $1436.57, on that portion of the assets which were sold for $5059.

The First National Bank had a chattel mortgage dated 11-2-55 on a 1956 Ford Truck, which was sold for $890, to secure its claim in the net amount of $963.62.

Briggs Weaver Machinery Co. had a chattel mortgage dated April 28, 1955, recorded May 3, 1955 (on that portion of the assets which were sold for $400), to secure its claim in the net amount of $2,466.71.

The City of Dallas had levied and assessed personal property taxes against Tubbs for the year 1955 on Sept. 12, 1955, in the amount of $62.63, and for the year 1956 on Sept. 4, 1956, in the amount of $72.56.

The United States of America levied and assessed excise taxes in the amount of $5503.95 and withholding taxes in the amount of $3315.77 against Tubbs on Aug. 15, 1956, and filed its notice of tax lien to secure the payment of said taxes on Oct. 15, 1956.

The district court, after a trial, held that under the provisions of the priority statute,[2] the claim of the United States was prior and superior to all the other claims and gave judgment for the United States.

Appealing from that judgment, the mortgage lien claimants are here contending that the liens created by their chattel mortgages were valid first liens on the respective properties covered, that they attached to the proceeds received from the sale of the respective properties and that they are, therefore, entitled to have applied to their claims the amount of such respective proceeds necessary to satisfy their claims in full.

The appellant, City of Dallas, contends that under the provisions of Sec. 194 of its charter, its claim for taxes is secured by a lien prior and superior to all other claims and it is therefore entitled to be paid ahead of everyone else.

On its part, the appellee, the United States of America, is here contending that the holding of the trial court was correct, and insisting that the judgment should be affirmed.

In support of their claims, the lien claimants invoke and rely strongly on the decision of this court in *United States v. Atlantic Municipal Corporation*, 212 F. 2d 709, in which,

[2] "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." 31 USCA, Sec. 191.

holding that the priority statute has no application to a valid, specific and perfected, a fully choate lien, the court declared:

> "* * * This statute applies only as against unsecured debts, that is, debts not secured by a specific and perfected lien. It has never been, we think it will never be, applied as it is sought to be applied here, to accord payment to a debt due the United States in preference to a claim secured by a lien which is prior in time and superior in law to the lien of the United States securing the debt for which preferential payment is sought."

Urging upon us that under that decision and Sec. 6323 of the Internal Revenue Code of 1954, formerly Sec. 3672 I. R. C. 1939, mortgage liens cannot, under a claim of priority, be postponed to a federal tax debt, they insist that the judgmnet was wrong and must be reversed.

The United States, on its part, urging upon us that the claim of the United States, by virtue of the provisions of Sec. 3466 of the Revenue Statutes, the priority section, will be accorded priority over the unperfected, the inchoate tax claim of the City of Dallas, and that it in turn is clearly superior to the chattel mortgage lien claims of the other appellants, insists that of necessity its claim must be prior to those claims, since it is admitted that their claims are subject to the City's tax lien. In addition, arguing that the Supreme Court has never held that even a specific and perfected lien would defeat a Sec. 3466 priority claim and that if the liens of the claimants are specific and per-

fected, this would not avail them, it insists that under federal law appellants' liens are not so specific and perfected since the debtor had not on the date of insolvency been divested either of title or possession of the mortgaged property.

We cannot agree with these views. On the contrary, for the reasons stated by us in the Atlantic case, *supra*, and for the additional reason that in this case the mortgage liens are within Sec. 6323, I. R. C. of 1954 (formerly Sec. 3672) and are specifically preserved by that statute against federal tax liens, *U. S. v. Sec. Trust Co.*, 340 U. S. 47, concurring opinion page 51, and *United States v. Scovil*, 348 U. S. 218, we are in no doubt that the claim of the United States to priority over the mortgage claims is without foundation.

We will not, therefore, contribute to the confusion arising from the decisions dealing with the relative standing as to priority of federal tax debts and liens and the numerous and unavailing attempts to rationalize and reconcile them. We will content ourselves with saying that upon a consideration of the relevant facts and a review of the authorities now extant, we are of the clear opinion that

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One of the most thorough and comprehensive of these is the July 15, 1956, Report of the Committee on Relative Priority of Government and Private Liens, American Bar Association Section of Real Property, Probate and Trust Law. Among the numerous articles in legal periodicals referred to in this report deserving of special notice may be cited: "The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien" (5-17-94), 63 Yale Law Journal, 905; and "Priority of the Subsequent Federal Tax Lien over an Antecedent Inchoate Lien" (April, 1956), 54 Michigan Law Review, 829.

the claim of the United States to priority over the mortgage lien claims is unfounded, and that, on the appeal of the mortgage lien claimants, the judgment must be reversed with directions to provide for the payment of the claim of each out of the proceeds of the property on which its lien was fixed, subject, however, to first payment thereout of the City's tax claims.

We thus, while affording protection to the City's claims for taxes by directing their payment, reject both the claim of the City that, under In Re: Brannon, 62 F(2) 959 and *City of Dallas v. Crippen*, 171 F(2) 256, "its general lien"[4] defeats the priority claim of the United States and the contention of the United States that, because we have concluded that its claim is entitled to priority over the City's claim and the City's claim is entitled to payment ahead of the mortgage lien claims, the circuity problem presented thereby compels the solution adopted in *State v. Nix*, 159(2) 214, putting the claim of the United States ahead of them both.

We do this, as to the City's claim, which is admittedly not within Section 6323, on the authority of the cases relied on by the United States.[5] We do this as to the claim of the

[4]Par. E 12 of the stipulation provides:

"That under the provisions of Sec. 194 of the Charter of the City of Dallas the defendant, City of Dallas, has a general lien upon all the property involved herein for the 1955 and 1956 taxes owing by the Tubbs Mfg. Co., Inc. to the said City of Dallas."

[5]New York v. Maclay, 288 U. S. 290; Spokane County v. U. S., 279 U. S. 80; United States v. Gilbert Associates, Inc., 345 U. S. 361; United States v. New Britain, 347 U. S. 81; United States v. Texas, 314 U. S. 480; United States v. Waddill, Holland and Flinn, Inc., 323 U. S. 353; United States v. White Bear Brewing Co., 350 U. S. 1010.

United States, both on the ground that the invoked decision in the *Nix* case, *supra*, while correct, indeed inevitable under its facts and the decisions of the Supreme Courts of Texas and of the United States, is not in point here in law or in fact, and on the ground that we agree with the well reasoned opinion of the Appellate Court of Illinois in *Samms v. Chicago Title & Trust Co.*, *11* NE(2) 172, and the solution of the circuity problem[6] adopted there. Cf. *Smith v. United States*, 113 F. Supp. 702 at 710-711 and 67 Harvard Law Review at p. 358.

The judgment awarding the United States priority and directing the clerk to issue his check to it for the moneys on deposit, received from the sale of the assets of the debtor is accordingly reversed, and the cause is remanded with directions to enter judgment awarding priority to the respective mortgage claimants, subject to payment of the city's taxes due on the respective properties, and directing the clerk to issue his check to each of the claimants in payment of its debt to the extent that the funds

[6]The circuity problem in general is interestingly discussed at pp. 927-28, 63 Yale Law Journal, Note 3, supra, where the author points out that in Brown v. General Laundry, 139 Conn. 363, 94 Atl. 2d 10, the Connecticut Supreme Court of Errors having resolved a tri partite priority problem as the courts of Texas had originally done by relegating the claim of the United States to the lowest rung on the priority ladder, the Supreme Court on the appeal of the United States, suggesting that the United States was not concerned with the relative priorities between the city, the mortgagee, and the judgment creditor, provided that the government's claim was subordinated only to an amount equal to the claims of the mortgage and judgment creditor, left the court in a position on remand to follow the state policy by appropriating the funds set aside by the Supreme Court for the mortgagee and judgment creditor to the payment of the city's liens.

derived from the property secured by its mortgage permit, and to issue his check to the United States for the balance remaining undistributed.

REVERSED and REMANDED.

(Seal)
A true copy Test:

/s/ Edward W. Wadsworth
EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit, New Orleans,
Louisiana

APPENDIX B

JUDGMENT

Extract from the Minutes of June 28, 1957.

No. 16565

EXCHANGE BANK & TRUST COMPANY and BRIGGS WEAVER MACHINERY CO., FIRST NATIONAL BANK IN DALLAS, and CITY OF DALLAS, TEXAS, Intervenors,

versus

TUBBS MANUFACTURING COMPANY, INC., and UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court awarding the United States priority and directing the clerk to issue his check to it for the moneys on deposit, received from the sale of the assets of the debtor in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter judgment awarding priority to the respective mortgage claimants, subject to payment of the city's taxes due on the respective properties,

and directing the clerk to issue his check to each of the claimants in payment of its debt to the extent that the funds derived from the property secured by its mortgage permit, and it issue his check to the United States for the balance remaining undistributed.

APPENDIX C

ORDER DENYING REHEARING

Extract from the Minutes of August 5, 1957.

No. 16565

EXCHANGE BANK & TRUST COMPANY and BRIGGS WEAVER MACHINERY CO., FIRST NATIONAL BANK IN DALLAS, and CITY OF DALLAS, TEXAS, Intervenors,

versus

TUBBS MANUFACTURING COMPANY, INC., and UNITED STATES OF AMERICA.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.